Supreme Court, U.S.
FILED

95 • 872 NOV 6 1995

OFFICE OF THE CLERK

NO ._____

In The

Supreme Court of the United States
October term, 1995

Wayne Traywick,
Petitioner
V.
Medical University of South Carolina
"Et Al"
Respondents

On Petition For A writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

Petition For A Writ of Certiorari

Wayne Traywick
2319 Modena Drive
Nashville, Tn. 37214
615-889-8299

QUESTIONS PRESENTED

1. Judge Carr acknowledges the fact that the defendants censored the plaintiff's speech, but he goes on to give the defendants qualified immunity for doing what a reasonable school official would have done under the circumstances. So, can a judge create his own criteria for qualified immunity, ignore the real criteria, and grant the defendants qualfied immunity for doing what a reasonable school official would have done under the circumstances?

2. Judge Carr acknowledges the fact that the defendants violated the plaintiff's constitutional right of due process, but he goes on to give the defendants qualfied immunity for doing what a reasonable school official would have done under the circumstances. So can a judge create his own criteria for qualfied immunity, ignore the real criteria, and grant the defendants qualfied immunity for doing what a reasonable school official would have done under the circumstances?

3. Judge Carr acknowledges the fact that the defendants breached a twelve page contract signed by the plaintiff, the honor code, but he either dismissed it because it is a state claim (according to him) or he gave the defendants qualfied immunity for doing what a reasonable school official would have done under the circumstances. So, can a judge create his own criteria for qualified immunity, ignore the real criteria, and grant the defendants qualified immunity fordoing what a reasonable school official would have done underthe circumstances, and can he dismiss the plaintiff's Federal contract claim by calling it a state claim?

4. Judge Carr acknowledges the fact that the defendants did not follow their own policies outlined in the student bulletin when dismissing the plaintiff, but he either dismissed it because it is a state claim (according to him) or he gave the defendants qualied immunity for doing what a reasonable school official would have done under the circumstances. So can a judge create his own criteria for qualified immunity, ignore the real criteria, and grant the defendants qualified immunity for doing what a reasonable school official would have

done under the circumstances, and can he dismiss the plaintiff; federal contract claim by calling it a state claim?

5. Did the defendants violate the plaintiff's equal protection right by not giving the plaintiff due process of law?

6. According to Judge Carr, the defendants violated the plaintiff's constitutional rights of due process and freedom of speech and they did not follow their own policies when dismissing the plaintiff. So, does this court agree with Judge Carr?

7. What is the criteria for qualified immunity and does judge carry criteria contradict the real criteria?

8. Can the defendants wantonly oppress the rights of the poor and not be found guilty of their actions?

PARTIES TO THE PROCEEDINGS

Wayne Traywick
petitioner
vs .

M.U.S.C.
Dr. Fitzhugh Hamrick, Dr. Richard Dom,
Dr. David Whittaker, Dr. Richard DeChamplain,
Dr. James Tietge, Dr. Edwards, Dr. John Blackburn
Dr. Robert Holmes, Dr. Charles Hook, Dr. Donald
Nelson, & Dr. Daneil Sneed,
Respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
APPENDIX	1a

No _____.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Wayne Traywick
Petitioner,
V.

Medical University of South Carolina
" Et A1"

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For the Fourth Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth circuit is reproduced in the appendix starting at la. The unreported decision of the United States District Court for the District of South Carolina is reproduced is in the appendix also.

JURISDICTION

The United States Court of Appeals decided the plaintiff's case on Sept. 21, 1995, and a timely petition for rehearing; was denied by the United States court of Appeals on Oct. 17, 1995, and a copy of this order appears in the appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1. The test for qualfied immunity
2. The plaintiff's constitutional rights of freedom of speech, due process, and equal protection.
3. Contract laws: The honor code and the student bulletin.

STATEMENT OF THE CASE

The plaintiff was a first year dental student at the Medical University of South Carolina, and after the fall semester he received a letter from the dean stating that he had been unanimously voted out for exhibiting characteristics which seem inappropriate for one seeking to become a dentist (See exhibit A, Minutes of the Academic Performance Committee and exhibit By the plaintiff's dismissal letter). Afterwards, the plaintiff deposed Dr. Hamrick, and Dr. Hamrick informed the court under oath that before the plaintiff was dismissed from the university he did not receive a specific charge, a notification of a hearing, a hearing, a chance to cross examine adverse witnesses, a chance to examine the evidence against him, and a chance to give his own testimony. Also Dr. Hamrick admitted that the plaintiff did not get dismissed for academic reasons but for behavior problems. The plaintiff finished the semester with a g.p.a. of a 2.7, which is above the 2.0 minimum required at the university. (Note Dr. Hamrickws entire deposition was provided to the lower court). Then the plaintiff asked Dr. Dechamplain, the dean, to define those characteristics which seem inappropriate. He defined those characteristics as and I quote, "I think the fact that you were going around accusing some of our finest professors of treating you incorrectly, of using different curves for certain people, cheating,

of altering grades, and all of the accusations that you made to me in our conversations, to me seemed like very inappropriate for a professional man without concrete evidence to back it up." He went on to say that those were his personal reasons
why he supported the decision of the Academic Performance Committee.

The plaintiff informed Judge Carr of these established facts, Then he went on to tell the judge that in dismissing the plaintiff from the university the defendants breached three contracts he had with the university and the defendants. The contracts are as follows: A) the honor code signed by the plaintiff informing of his rights, B) a statement in the student bulletin stating that the school reserves the right to sever students by giving them due process of law, C) the plaintiff's due-process rights outlined in the student bulletin (see exhibit C).

From here the defendants went on to tell the court that the plaintiff got dismissed for certain utterances. So the judge in a series of steps acknowledged that the defendants censored the plaintiff's speech, violated his constitutional right of due process, an did not follow their policies outlined in the honor code and the student bulletin when dismissing the plaintiff. Instead of actually convicting them of their civil violations, Judge Carr gave the defendants qualified immunity for doing what a reasonable school official would have done under the circumstances. Thus, he invented his own criteria, ignoring the real criteria.

Shocked, the plaintiff appealed the decision of the lower court. The court of appeals denied the plaintiff's appeal, stating that it agreed with the reasoning of the lower court. Shocked again, the plaintiff petitioned the court for a rehearing, and it denied the rehearing. So here we are to determine if the defendants can be given qualified immunity for doing what a reasonable school official would have done under the circumstances.

Exhibit A Exhibit B Exhibit C.

REASONS FOR GRANTING THE WRIT

Review should be granted because Judge Carr ignored the real criteria for qualfied immunity and gave the defendants qualfied immunity for doing what a reasonable school official would have done under the circumstance. This made up criteria is in conflict with case laws concerning qualified immunity. Also, the defendants oppressed the rights of the poor. They violated the plaintiff's constitutional rights of due process and freedom of speech and breached three contracts he had with them and the school. The plaintiff contends that because he was not given due process the defendants also violated his constitutional right of equal protection. So, the court's action by making up its own criteria for qualified immunity departed from the usual and accepted course of judical proceedings.

Further, it is important for the writ to be granted because the plaintiff's education at the medical university is at stake. The school will always be there, but the plaintiff has only one life. Now on a much larger level all students attending school in the United States should be protected by the Constitution of the United States and contract laws. If school official deprive students of their constitutional rights and breach contracts, they must be held accountable. This goes for all students, including the plaintiff. Finally, the defendants are guilty of oppressing the rights of the poor.

EXHIBIT A

ACADEMIC PERFORMANCE COMMITTEE
FALL SEMESTER 1994

College of Dental Medicine - Freshman Class

Tuesday, December 21, 1995 (Room 445)

Members Absent

Course Directors Present

D. Dougharry, Millar, Whitaker, Tiarge, and Gellin

The meeting was called to order at 9:00a.m. by Dr. Hamrick.

The performance of the freshman class in each course was reviewed.

Histology - no failures

Dr. Dougherry said Wayne Traywick has ideas he feels very strongly about. He said Wayne would not take a make-up exam because now some students have a higher grade than he has with the make-up exam. Wayne said since the Histology grades were curved it was not fair.

Biochemistry I
Wayne Traywick had an average of 82. He told Miller since he had a good average he would like to exempt the exam. He was told he had to have average of 95 to exempt. He then asked if he could take the exam early so he could take his family to Disney World, Dr. Miller said no, he would have to make up another exam to give him his early.

Dental Morphology. There was on failure - Wayne Traywick. Dr. Whittaker said it is a relaxed group. Wayne Traywick failed the

course. His exams were good and daily quizzes were an average of 90. His lab work is atrocious. Out-of-class assignments were given to him, he was shown how to do them, and was given directions. A senior student, Jim Finkel, volunteered to help the freshman students with waxing. He showed up for waxing sessions but he said if it wasn't one on one he didn't want to be part of it. He never turned in any extra projects in to Dr. Whittaker. Dr. Whittaker said the class president was informed by Wayne Traywick that he would not go to the Memorial Service for the cadavers because of his feelings about Anatomy. Lab wise Crown and Bridge will be hard waxing and he doesn't have the manual dexterity other students hae Dr. Tietge said. There is a letter submitted by Drs. Whittaker and Tietge explaining the problems of manuel dexterity etc. Dr. Hamrick read the letters to the Committee. It was noted that the pressure will get worse fot the students. Dr. Sneed motioned that Wayne Traywick be dismissed. Dr. Hook seconed the motion. The committee voted unaimously to dismiss him for the following reasons: academic difficulty, unprofessional behavior and manuel dexterity. It was also suggested by the comittee that he gets professional counceling.

Pre. Clinical Occlusion -

Preventive Periodontics - no failures

Preventive Dentistry - no failures

EXHIBIT B

December 21, 1993

Mr. Wayne Traywick
142 Heritage Circle
Mt. Pleasant, South Carolina 29464

Dear Mr. Traywick:

The Academic Performance Committee of the College of Dental Medicine met today to review the progress of each class. They recommended to me that you be dismissed from the College of Dental Medicine.

This recommendation was based in accordance with our student progress guidelines which state that any student who exhibits personal characteristics which seem inappropriate for one seeking to become a dentist will be considered for dismissal regardless or academic performance." The committee also noted your extreme difficulty in courses which involved manual dexterity.

Upon review, this action seems appropriate to me and I, therefore, must tell you that you will be dropped from the rolls of the College of Dental Medicine effectively immediately.
Pleas see Doctor Hamrick when he is back in his office on January 3 if you have any questions about this decision or if you, for any reason, wish to appeal it.

Sincerely yours,

Richard W. DeChamplain, D.M.D.

EXHIBIT C

Conduct Review

Any complaint that alleges misconduct, dishonesty, or breach of ethics by a university student, including but not limited to allegations of academic dishonesty, shall be made in writing to the chairman of the hearing committee (complaint committee or honor council) appropriate to each college. The hearing committee (complaint committee or honor council) shall provide for a review of the complaint to determine whether there is sufficient substance to proceed to a full hearing. The hearing committee shall advise the appropriate dean of any action toe proceed or to desist.

1. A standing college hearing committee (complaint committee or honor council) shall consist of students and faculty of the college appointed annually by the dean of the college. No students or members of the faculty who are involved in the alleged breach of ethics or misconduct of the student shall sit on such hearing committee. The dean may augment the membership of the hearing committee if necessary to assure that the hearing committee consist of at least five members.
2. The hearing committee shall elect a chairman who shall conduct the hearing.
3. The chairman shall provide the student with written notice of the full hearing not less than seven calendar days prior to the scheduled hearing date. The written notice shall include:
   a. short and plain statement of the charge(s) and supporting facts;
   b. the time and place of the hearing;
   c. a statement of the rights of the parties to bring witness, to bring witness, to present evidence, have representation by faculty advisor of choice, and to conduct cross-examination of witnesses;
   d. the right upon request to be given a list of the adverse witnesses.
4. A record of the hearing shall be made which shall include a

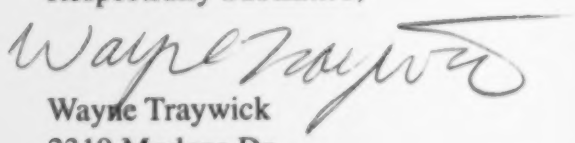
recording of the oral proceedings and all evidence received or considered.

5. The committee shall render a written recommendation to the dean of the college which shall include the reasons for the recommendation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,



Wayne Traywick
2319 Modena Dr.
Nashville, TN 37214
615-889-8299

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 17, 1995

No. 95-1814
CA-94-361-2-8AJ
CA-94-857-2-8AJ
C-94-657-2 -8AJ

WAYNE TRAYWICK

Plaintiff -Appellant

v.

MEDICAL UNIVERSITY OF SOUTH CAROLINA; FITZHUGH HAMRICK, Doctor; RICHARD DECHAMPLAIN, Doctor; DAVID A. WHITTAKER, Doctor; RICHARD M. DOM, Doctor; JAMES D. TIETGE, Doctor; Doctor EDWARDS; JOHN BLACKBURN, Doctor; ROBERT HOLMES, Doctor; CHARLES HOOK, Doctor; DONALD NELSON, Doctor; DANIEL SNEED, Doctor, but not Dr. Javed, since he was out of the country

Defendants Appellees

O R D E R

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,
/s/ Bert M. Montague
CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1814

WAYNE TRAYWICK,

Plaintiff - Appellant,

versus

MEDICAL UNIVERSITY OF SOUTH CAROLINA; FITZHUGH HAMRICK, Doctor; RICHARD DECHAMPLAIN, Doctor; DAVID A. WHITTAKER, Doctor; RICHARD M. DOM, Doctor; JAMES D. TIETGE, Doctor, DOCTOR EDWARDS; JOHN BLACKBURN, Doctor; ROBERT HOLMES, Doctor; CHARLES HOOK, Doctor; DONALD NELSON, Doctor; DANIEL SNEED, Doctor, but not Dr. Javed, since he was out of the country,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Solomon Blatt, Jr., Senior District Judge. (CA-94-361-2-8AJ, CA-94-857-2-8AJ, CA-94-657-2-8AJ)

Submitted: August 8, 1995 Decided: September 21, 1995

Before WILKINS, NIEMEVER, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Wayne Traywick, Appellant Pro Se. Robert Holmes Hood, Christine Lynn Companion, William Richardson Hearn, Jr., HOOD LAW FIRM, Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM

Appellant appeals from the district court's order denying relief on his 42 U.S.C. § 1983 (1988) complaint- We have reviewed the record and the district court's opinion accepting the magistrate judge's recommendation and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Traywick v. Medical Univ. of S.C., Nos. CA-9 -361-2-8AJ, CA-94-857-2-8AJ, CA-94-657-2-8AJ (D.S.C. Ma-. 27, 1995). We deny Appellant's Motion for an Injunction and for a hearing on that motion. Appellant's Motion for an Expedited Appeal and to expedite the injunction are now moot and are dismissed for that reason. We also deny Appellant's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT ORIGINAL Filed
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WAYNE TRAYWICK
-vs
MEDICAL UNIVERISTY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK, DR. WHITTAKER, DR. DOM and DR. TIETGE
Case Number: 2:94-361-8AJ
WAYNE TRAYWICK
-vs Case Number: 2:94-857-8AJ

MEDICAL UNIVERISTY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK, DR. JOHN BLACKBURN, DR. ROBERT HOLMES, DR. CHARLES HOOK, DR. DONALD NELSON and DR. DANIEL SNEED

WAYNE TRAYWICK
-vs Case Number: 2:94-657-8AJ
MEDICAL UNIVERISTY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK and DR. EDWARDS

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered._

IT IS ORDERED AND ADJUDGED that the Report and Recommendation of Magistrate Judge Robert S. Carr is adopted 5a

and the defendants' motion for summary judgment is granted. More specifically, the plaintiff, WAYNE TRAYWICK's claims against the individual defendants are dismissed on the grounds of qualified immunity, the claims against MUSC are dismissed for failure to state a cause of action, and the pendent state claims are dismissed without prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that all other pending motions are moot in light of this recommendation with leave to refile the motions in the event this court's order is reversed.

LARRY W. PROPES, Clerk
March 27, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Wayne Traywick,
Plaintiff,
-vs
Medical University of South Carolina, Dr. Dechamplain, Dr. Hamrick, Dr. Whittaker, Dr. Dom and Dr. Tietge,
Defendants.

Civ. Act. No. 2:94-361-8AJ

ORDER

Wayne Traywick,
Plaintiff,
-vs-
Medical University of South Carolina, Dr. Dechamplain, Dr. Hamrick, Dr. John Blackburn, Dr. Robert Holmes, Dr. Charles Hook, Dr. Donald Nelson, and Dr. Daniel Sneed,
Defendants.

Civ. Act. No. 2:94-857-8AJ

This is a pro se action by the plaintiff, Wayne Traywick, against the Medical University of South Carolina (MUSC) and administrators and professors of MUSC (school officials) challenging his dismissal from MUSC's school of dentistry. The record includes the report and recommendation of United States Magistrate Robert S. Carr, in which report the magistrate judge recommends that the respondents' motions for summary judgment be granted. The parties were given notice of the right to file objections to the report and recommendation and of the consequences for a failure to do so; in response, the petitioner filed objections with the court. The defendants then filed a response to the petitioner's objections.

The report and recommendation of the United States Magistrate Judge was made in accordance with 28 U.S.C. §636 and the local rules of this district concerning reference to a magistrate

magistrate judge. See United States Maqistrates, Local Rule 19, D.S.C.; Social Securitv Cases, Local Rule 20, D.S.C.; Bowman v. Bordenkircher, 522 F.2d 209 (4th Cir. 1975). Under 28 U.S.C. §636(b),

[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Here, objections to the magistrate judge's report were filed by the petitioner and the court has conducted a de novo review of those portions of the magistrate judge's report to which objections were made. Having now reviewed this matter, the court concludes that the magistrate judge properly resolved the issues presented in this case. Accordingly, for the reasons cited in the magistrate judge's report and recommendation, which is adopted and incorporated herein as the order of this court, the respondents' motions for summary judgment are hereby granted. More specifically, the plaintiff's claims against the individual defendants are dismissed on grounds of qualified immunity, the claims against MUSC are dismissed for failure to state a cause of action, and the pendent state claims are dismissed without prejudice. In addition, it is ordered that all other pending motions are hereby dismissed as moot in light of this recommendation with leave to refile the motions in the event this court's order is reversed.

IT IS SO ORDERED.

Sol Blatt, Jr.
Senior U.S. District Judge

March 27, 1995 Charleston, SC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WAYNE TRAYWICK, C. A. No. 2: 94-361-8AJ
Plaintiff,

-versus-

MEDICAL UNIVERSITY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK, DR WHITTAKER, DR. DOM, AND DR. TIETGE,
Defendants.

WAYNE TRAYWICK,
Plaintiff,
-versus-

MEDICAL UNIVERSITY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK, AND DR. EDWARDS,
Defendants.

WAYNE TRAYWICK,
Plaintiff,

-versus-

MEDICAL UNIVERSITY OF SOUTH CAROLINA, DR. DECHAMPLAIN, DR. HAMRICK, DR. JOHN BLACKBURN, DR. ROBERT HOLMES, DR. CHARLES HOOK, DR. DONALD NELSON, AND DR. DANIEL SNEED,
Defendants.

REPORT AND RECOMMENDATION

This is a pro se action by the plaintiff, Wayne Traywick (Traywick), against the Medical University of South Carolina (MUSC) and administrators and professors of MUSC (the school officials) challenging his dismissal from MUSC's school of dentistry. The individual defendants are Dr. Richard W. DeChamplain, Dean of tie College of Dental Medicine; Dr. Fitzhugh N. Hamrick, Assistant Dean for Academics, Dr. Whittaker, a professor who gave the plaintiff an unfavorable academic rating; Dr. Dom, a professor who instructed the plaintiff in gross anatomy; Dr Tietge, a professor who gave the plaintiff an unfavorable academic rating; Dr. Edwards, President of MUSC; Dr.
Blackburn, a professor and member of the Academic Performance Committee, Dr. Holmes, a professor and member of the Academic Performance Committee, Dr. Hook, a professor and member of the Academic Performance Committee, and Dr. Sneed a professor and member of the Academic Performance Committee. The matter is now before the court on a variety of motions the principal one of which is the defendants' motions for summary judgment filed on April 5, 1994, and August 16, 1994 (Documents 43, 44, 45 (but numbered 45, 46-47), 61, 62, 73 and

This represents the consolidation of four cases filed by this plaintiff. The lead case is CA No. 2:94-0361-8AJ. The second case, C. A. No. 94-418-8AJ, has been consolidated and closed by the Order of this court. The third case, C. A. No. 94 0657-8AJ, is a demand for "Tort & punitive damages 50 million dollars" and "mental distress/duress damages 8 million dollars" because other students were given a variety of rights when disciplined that apparently the plaintiff alleges he was not given. The defendants have interpreted the complaint as an attempt to state causes of action for a violation of equal protection and due process clauses of the United States Constitution, breach of contract and a "whistle blower" cause. The fourth case, C. A. No. 94-0857-8AJ involves a demand for "mental duress/distress 20 million", "tort and punitive damages: 30 million" and "to get reinstated at M.U.S.C." as the result of alleged violations of his right of free speech. Both of these cases were consolidated with this

case by an order of Judge Blatt on August 23, 1994. Nevertheless, on February 15, 1995, a report and recommendation was entered with regard to a pending motion for summary judgment by the plaintiff in CA Nos. 94-0657 and 94- 857. That Report and Recommendation is being withdrawn as improvidently entered. These multiple claims and two improvident appeals have been a source of much confusion, and the plaintiff has been warned of the possibility of sanctions.

In their motions the defendants assert, among other things:

1). Qualified Immunity of the individual defendants.

2). Immunity of MUSC for money damages.

3). A failure of proof on the claims of first amendment, due process and equal protection violations.

4). Eleventh Amendment immunity from suit on state law claims under the South Carolina Whistleblower Act, South Carolina Code Annotated section 8-27-10 and breach of contract.

The plaintiff was provided a copy of the defendants' summary judgment motions, an explanation of summary judgment procedures, and pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975).

Traywick responded to these motions on April 8, and August 22, 1994, (Documents 47 &\64), and the defendants replied on April 15, October 11 and November 3, 1994, (Documents 51, 73 and 79).

It appears that the matter is ripe for review.

The relevant facts as found by this court in its Report and Recommendation filed March 22, 1994, are undisputed:

[T]he plaintiff was a first semester student at the College of Dental Medicine of the Medical University of South Carolina in the fall of 1993. At the mid-term point, October, 1993, he was advised that he was having difficulty in his courses on

Dental Morphology and Pre-Clinical Occlusion. Subsequently in December, 1993, the plaintiff was advised that he would not be receiving credit for the course in Dental Morphology.

On December 21, 1993, the Dean of the College of Dental Medicine, Dr. Richard W. DeChamplain, sent the plaintiff a letter advising, "The Academic Performance Committee of the College of Dental Medicine met today to review the progress of each class. They recommended to me that you be dismissed from the College of Dental Medicine.

The Dean continued that the recommendation was based upon the student progress guidelines which included a consideration of personal characteristics which seem inappropriate for one seeking to become a dentist. Further, the committee noted the plaintiff's extreme difficulty in courses involving manual dexterity. Finally, upon review, the Dean advised Traywick that he accepted the recommendation of the committee and advised the plaintiff that he would be immediately dropped from the rolls of the College.

The plaintiff appealed this decision to the ad hoc committee of the University and a hearing was held on January 5, 1994. The plaintiff was present and represented by counsel. After private deliberations and interviewing the Dean of the College, the Committee found that the recommendation of the Academic Performance Committee was justified on the basis of the following:

1. On-going attitudinal and behavioral actions bringing into question Mr. Traywick's professional judgment.

2. Significant concerns expressed by several faculty with regards to Mr. Traywick's lack of proficiency in manual skill areas critical to the profession of dentistry.

3. Marginal academic performance to date, particularly in aforementioned manual skill

(Report and Recommendation, pgs. 4-6)

The defendant has submitted reams of additional documents, including depositions of school officials opining that Traywick's dismissal was based upon his behavior as his academics. However, none of the additional submissions place in issue any of the above cited facts. Accordingly, it is appropriate to consider the plaintiff's, claims in light of these undisputed facts.

The defendants have asserted defenses of qualified immunity analysis of which requires consideration of whether the defendants' actions violated clearly established constitutional rights of which a reasonable school official in their position should have known Accordingly, in light of the developed record and the apparent ability of federal courts to review an academic decision of a public institution under a substantive due process standard, Board of Curators, Univ. of Mo. V. Horowitz 435 U.S. 78, 91-92, 98, 948, 955-956, 55 L.Ed.2d 124 (1978) the merits of the plaintiff's due process claim must be considered.

In order to prevail on a due process violation geared to educational benefits, an individual must first establish that he had a protectable property interest of which he could not be deprived without due process, and that he was deprived of that right without due process protection from an arbitrary and capricious dismissal.

It is not at all clear that the plaintiff herein had a property interest in continued enrollment in MUSC or that his right was subject to the protection of substantive due process. Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507 (1985) .2 Further, the

2 Note, however, that at least in the area of student disciplinary actions, since the landmark decision of the Court of Appeals for the Fifth Circuit in Dixon v. Alabama State Board of Education, 294 F.2d 150, cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961), the lower federal courts have uniformly held the Due Process

Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion. Hagopian v. Knowlton, 470 F.2d 201,
211 (CA2 1972); Wasson v. Trowbridae, 382 F.2d 807, 812 (CA2 1967); Esteban v. Central Missouri State Colleqe, 415 F.2d 1077,1089 (CA8 1969), cert. denied, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970); Vouaht v. Van Buren Public Schools, 306 F.Supp. 1388 (ED Mich. 1969); Whitfield v. Simpson, 312 F.Supp. 889 (ED Il1.1970); Fielder v. Board of Education of School District of Winnebaao, Neb , 346 F.Supp. 722, 729 (D.C.Neb.1972); DeJesus v. Penberthv, 344 F.Supp. 70, 74 (D . C . Conn . 1972); Soalin v. Kauffman, 295 F.Supp. 978, 994 (W.D. Wis.1968) ;, aff'd, 418 F.2d 163 (CA7 1969); Stricklin v. Reqents of University of Wisconsin, 297 F.Supp.416, 420 (W.D. Wis. 1969), appeal dismissed, 420 F.2d 1257 (CA7 1970); Buck v. Carter, 308 F.Supp.

defendants do not concede the existence of such a right. However, for the purposes of considering the immunity issues, it is sufficient to assume the existence of such a right and consider the extent of due process accorded the plaintiff.

In the employment context, due process requires as a minimum, that a public employee with a protected property interest in employment be furnished with notice of the charges raised against him and a meaningful opportunity to respond to those charges prior to a deprivation of that
interest. Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974)). In the context of school-disciplinary proceedings, due process requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have
and an opportunity to present his side of the story." Goss v. Lopez, 413 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Misconduct decisions require a much more formalized and legalistic process than do decisions based on scholarship. With regard to academic decisions

the process that is due is not the judicial model of a civil or criminal trial, see,Mathews v. Eldridve, 424 U.S. 319, 348 (1976); Nash v. Auburn University, 812 F.2d 655, 660 (llth Cir. 1987). Accordingly, it appears that in making academic decisions concerning students, due process requires no more, and, probably less, than that accorded the plaintiff here. That is, advance notice of the charges, a fair opportunity to be heard and an impartial decision-maker. See, Goss v;- Lopez, 419 U.S. 565, 579 (1975); Goldberq v. Kelly, 397 U.S. 254, 271 (1970); Nash v. Auburn University, 812 F. 2d at 661-663, 665.

Here the facts are clear. The plaintiff was dismissed on the recommendation of the Academic Performance Committee that the plaintiff was not fit for continued enrollment based upon consideration of the grades the plaintiff received in courjses involving manual dexterity and his "personal characteristics which seem inappropriate for one seeking to become a dentist." The plaintiff was given notice of the basis for his discharge from the University. Indeed, he was aware from the very start of his student career that the University was concerned about his personal characteristics (See Exhibit. 10 to Defendant's Memorandum of Law filed April 5, 1994) . He was advised personally and in writing of dissatisfaction with his academic performance (Exhibit 11 to Defendants Memorandum filed April 5, 1994); he was given written notice of dismissal from the university and the reasons therefor (Exhibit 2 to Defendants' Memorandum of Law filed April 5, 1994); a hearing was held at which he appeared and was represented by counsel, and finally a written decision stating the reasons for the dismissal was issued. (Exhibit 4 to Defendants Memorandum filed April 5, 1994) . This was more than enough to protect the plaintiff from arbitrary state action.

Returning then to the immunities issue, it appears beyond cavil that the individual defendants are entitled to qualified immunity.

Viewed objectively the defendants did not violate any of the plaintiff's rights of which a reasonable school official in their

respective positions-should—have known. In reaching that conclusion the court has been mindful that the court's inquiry is one of objective reasonableness, Harlow v. Fitzqerald, 457 U.S. 800, 818 (1982). The actions of the defendants have been examined in light of what a reasonable official would do under the circumstances, Graham v. Connor, 490 U.S. 386, 397 (1989)

The plaintiff has consistently attempted to characterize the basis for his discontinued enrollment as a disciplinary proceeding or honor code conviction. However, the record clearly reflects that the defendants perceived their action as being one under the realm of the academic
progress committee, and in reviewing the immunity issue, subjective factors involving the officials' motive, intent, or propensities are not relevant to the inquiry. This objective inquiry as to the officials' perceptions at the time, limits the need for the court to sort through conflicting versions of the "actual" facts, and allows it to focus instead on what the official actually perceived. Gooden v. Howard Countv, Marvland, 954 F.2d 950, 965 (4th Cir. 1992) (en banc). Additionally, this objective nature of inquiry is intended to limit examination into the officials' objective state of mind, and to restrict secondhand guessing about the reasonableness of the actions with the benefit of hindsight. Hunter v. Bryant, 112 S.Ct. 534, 536-37 (1991); Graham v. Connor, 490 U.S. 386 at 396 (1989). Accordingly, the statement of the defendants, contemporaneous with their actions that they were acting under the procedures of the Academic Performance Committee forecloses any dispute about the nature of the proceedings for the purposes of determining qualified immunity. Turning then to the claim against MUSC, the alterego of the State of South Carolina, S. C. Code Annotated § 59-101-10 (Lawyers Co-op. 1976), the only remedy available to the plaintiff against the state is for prospective relief 11th Amendment, U.S. Constitution, Will v. Michigan Dept. Of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989), Ford Motor Co. V. Indiana Dept of Treasury, 323 U.S. 459, 65 S.Ct. 347 (1945). Further, in order to state a claim for prospective relief on the due process claims, Traywick must allege and prove an official

policy or custom caused a violation of his constitutional rights. Monell v. New York Dep't. of Social Servs., 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). To avoid summary judgment, plaintiff must produce evidence sufficient to show an MUSC policy or custom violated his constitutional rights. Here, he has failed to make the requisite showing.

Traywick has not alleged that an official MUSC policy violate his right guaranteed by the Constitution. The complaint is also devoid of any specific facts indicating the existence of such a policy. Accordingly, the plaintiff has also set out claims of equal protection and first amendment violations. These claims appear to be simply restatements of his claim that he was improperly dismissed from MUSC. They are patently unsupported by the undisputed facts, and applying a qualified immunity analysis to these claims reveals no indication that any of the named defendants violated the plaintiff's rights to equal protection of free speech of which a reasonable school official should have known. Plaintiff ' s § 1983 claim against MUSC is subject to dismissal under Rule 12(b) (5) . Even if the claim were adequately pled, plaintiff has not made any showing that MUSC policy or custom violated his constitutional rights. There is no evidence whatsoever that MUSC had a policy, official or otherwise, for excluding students from school without due process or law. Without a showing of an official policy or custom that caused the alleged constitutional violations, plaintiff's § 1983 claims against MUSC must fail.

Finally, it appears that with the dismissal of the federal claims, it is appropriate to decline pendent jurisdiction and dismiss without prejudice the state law claims of breach of contract and a violation of the South Carolina Whistleblower Act, South Carolina Code Annotated § 8-27-10 et seq in favor of their being brought in the state forum.

In summary, it is recommended that the claims against the individual defendants herein be dismissed on grounds of qualified immunity, that the claims against MUSC be dismissed for failure to state a cause of action, and that the pendent state claims be dismissed without prejudice. Finally, it is Ordered that all other pending motions herein be dismissed as moot in light of this recommendation with leave to refile the motions in the event the recommendation herein is rejected.

Respectfully submitted,

Robert S. Carr
United States Magistrate Judge

(2)

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

No. 95-872

In The

Supreme Court of the United States

October Term, 1995

WAYNE TRAYWICK,

Petitioner,

v.

MEDICAL UNIVERSITY OF SOUTH CAROLINA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. HOOD
Counsel of Record
WILLIAM R. HEARN, JR.
CHRISTINE L. COMPANION
HOOD LAW FIRM
172 Meeting Street
P.O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

QUESTION PRESENTED

Whether the Court of Appeals properly exercised its discretion in concurring with the legal standard used by the District Court in awarding qualified immunity to the individual Respondents for acting as reasonable school officials would have acted under the circumstances in dismissing Petitioner from dental school.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
PETITIONER IS NOT ENTITLED TO A WRIT OF CERTIORARI	4
CONCLUSION	6

TABLE OF AUTHORITIES

Page

CASES

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 54 (1989) . . . 4, 5

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 4

STATUTES

42 U.S.C. § 1983 1

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Medical University of South Carolina; Dr. Fitzhugh Hamrick; Dr. Richard DeChamplain; Dr. David A. Whittaker; Dr. Richard M. Dom; Dr. James D. Tietge; Dr. James B. Edwards; Dr. John Blackburn; Dr. Robert Holmes; Dr. Charles Hook; Dr. Donald Nelson; and Dr. Daniel Sneed, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit's Opinion in this case.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action was filed *pro se* by Petitioner who sought sizable money damages and reinstatement into the Medical University of South Carolina College of Dental Medicine as a result of his dismissal by the school's Academic Performance Committee in December of 1993. The Petitioner brought this 42 U.S.C. § 1983 action mainly asserting constitutional due process violations against the Respondents. In addition, the Petitioner made various freedom of speech, equal protection, and pendent breach of contract claims.

B. OPINIONS BELOW

On February 21, 1995, United States Magistrate Judge Carr issued his Report and Recommendation in favor of granting Respondents' Motion for Summary Judgment and dismissing all individually named defendants on the

grounds of qualified immunity. The Report and Recommendation also advised dismissal of the claims against the Medical University of South Carolina for failure to state a cause of action and declined jurisdiction for the pendent state causes of action. *See* Petitioner's Appendix at 8a.

After consideration *de novo* of the multiple objections filed by the Petitioner, the United States District Court adopted the Magistrate's Report and Recommendation and granted Respondents' Motion for Summary Judgment on March 27, 1995. *See* Petitioner's Appendix at 6a. The Fourth Circuit affirmed the District Court's decision on September 21, 1995, finding no reversible error. *See* Petitioner's Appendix at 2a. Finally, on October 17, 1995, the Fourth Circuit denied Petitioner's plea for rehearing. *See* Petitioner's Appendix at 1a.

C. COUNTER-STATEMENT OF THE FACTS

The United States Magistrate Judge based his Report and Recommendation on the below-stated factual allegations that were not, and have never been, disputed.

The Petitioner was a first semester student at the College of Dental Medicine of the Medical University of South Carolina in the fall of 1993. At the mid-term point, he was advised that he was having difficulty in his courses on Dental Morphology and Pre-Clinical Occlusion. Subsequently in December 1993, the Petitioner was advised that he would not be receiving credit for the course in Dental Morphology. On December 21, 1993, the Dean of the College of Dental Medicine, Dr. Richard W. DeChamplain, sent the Petitioner a letter advising, "The Academic Performance Committee of the College of Dental Medicine met today to review the progress of each class. They recommended to me that you be dismissed

from the College of Dental Medicine." The Dean continued that the recommendation was based upon the student progress guidelines which included a consideration of personal characteristics which seem inappropriate for one seeking to become a dentist. Further, the committee noted the Petitioner's extreme difficulty in courses involving manual dexterity, such as Dental Morphology. Finally, upon review, the Dean advised the Petitioner that he accepted the recommendation of the committee and advised the Petitioner that he would be immediately dropped from the rolls of the College.

The Petitioner appealed this decision to the *ad hoc* committee of the University and a hearing was held on January 5, 1994. The Petitioner was present and represented by counsel. After private deliberations and interviewing the Dean of the College, the Committee found that the recommendation of the Academic Performance Committee was justified on the basis of the following:

1. On-going attitudinal and behavioral actions bringing into question the Petitioner's professional judgment;

2. Significant concerns expressed by several faculty about the Petitioner's lack of proficiency in manual skill areas critical to the profession of dentistry; and

3. Marginal academic performance to date, particularly in aforementioned manual skill areas.

See Petitioner's Appendix 8a; Report and Recommendation of United States Magistrate Judge at pages 10a to 12a.

In short, the Petitioner was dismissed by action of the Academic Performance Committee. The lower court determined that the Petitioner was accorded all, if not more than, the process due a student dismissed on academic grounds. Accordingly, the lower court found that the individually-named Respondents were entitled to qualified immunity because they acted as reasonable school officials would under the circumstances.

PETITIONER IS NOT ENTITLED TO A WRIT OF CERTIORARI

The Petitioner appears to assert that the decisions below present several questions worthy of certiorari. These questions would, however, amount to a reconsideration of the entire case *de novo* by this Court. Ultimately, his "main question" inquires whether the lower court applied the correct criteria in awarding qualified immunity. Clearly, the lower court applied the proper objective reasonableness standard. Therefore, no grounds for granting this Petition exist.

The Petitioner erroneously claims that the District Court opinion upheld by the Court of Appeals applied incorrect criteria in evaluating the qualified immunity defense. The lower courts applied the test as set forth and recognized in, for example, *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 54 (1989). *See also, Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). In other words, viewing the Respondents' actions in an objective manner, the court found that they did not violate any of the Petitioner's rights of which reasonable school officials in

their respective positions should have known. The standard the court employed was neither novel nor one of the lower court's creation. Rather the court concisely applied to the undisputed facts of the case the qualified immunity test that has long been well established.

The Petitioner argues that in applying the reasonable official test the lower court overlooked the correct test. He queries this Court for the correct test, demonstrating his complete failure to read the law on this issue.

In determining that the named defendants violated no constitutional right of the Petitioner of which a reasonable school official should have known, the lower court evaluated each constitutional claim put forth by the Petitioner. In each instance, the court found that no due process, free speech or equal protection violation existed as a matter of law. As the court found that the first prong of the qualified immunity test was not met, no further evaluation was necessary. Therefore, Petitioner's claim that improper criteria were evaluated in this analysis is patently flawed.

Moreover, the Applicant's petition does not raise any issues of exceptional or national significance. The Court of Appeals opinion, as well as that of the District Court, represents a straightforward application of the qualified immunity test applied by *Graham v. Connor* and its progeny to the facts of this case. Those facts involve one student who has been unable to accept the administratively sound decision to dismiss him from dental school due to his academic deficiencies. This case raises no novel or exceptional issues. Nor will the impact of the decision below break any new ground.

CONCLUSION

Applicant's petition for writ of certiorari is without any basis and should be denied.

Respectfully submitted,

ROBERT H. HOOD*
*Counsel of Record
WILLIAM R. HEARN, JR.
CHRISTINE L. COMPANION
HOOD LAW FIRM
172 Meeting Street
P.O. Box 1508
Charleston, South Carolina 29402
(803) 577-4435

Dated: January 2, 1996